

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

GERALD GODIN, individually and on :
behalf of all others similarly situated, :
Plaintiff, :

Case No. 5:03-CV-1684

vs.

FIRSTENERGY CORP., *et al.*,
Defendants.

OPINION & ORDER
[Resolving Doc. Nos. 21, 23]

THOMAS MAHON, individually and on :
behalf of all others similarly situated, :
Plaintiff, :

Case No. 5:03-CV-1711

vs.

FIRSTENERGY CORP., *et al.*,
Defendants.

OPINION & ORDER
[Resolving Doc. Nos. 14, 16]

JOHN A. CAMPAGNUOLO, individually :
and on behalf of all others similarly situated, :
Plaintiff, :

Case No. 5:03-CV-1718

vs.

FIRSTENERGY CORP., *et al.*,
Defendants.

OPINION & ORDER
[Resolving Doc. Nos. 14, 16]

MICHAEL POLLACK, individually and on :
behalf of all others similarly situated, :
Plaintiff, :

Case No. 5:03-CV-1766

vs.

Case No. 5:03-CV-1684
Gwin, J.

FIRSTENERGY CORP., *et al.*,
Defendants

OPINION & ORDER
[Resolving Doc. Nos. 14, 16]

OLGA PYLPOW, individually and on
behalf of all others similarly situated,
Plaintiff,

Case No. 5:03-CV-1768

vs.

FIRSTENERGY CORP., *et al.*,
Defendants.

OPINION & ORDER
[Resolving Doc. Nos. 16, 18]

DAVID MALKA, individually and on
behalf of all others similarly situated,
Plaintiff,

Case No. 5:03-CV-1779

vs.

FIRSTENERGY CORP., *et al.*,
Defendants.

OPINION & ORDER
[Resolving Doc. Nos. 29, 31]

JACK MOHROR, individually and on
behalf of all others similarly situated,
Plaintiff,

Case No. 5:03-CV-1848

vs.

FIRSTENERGY CORP., *et al.*,
Defendants.

OPINION & ORDER
[Resolving Doc. Nos. 13, 15]

Case No. 5:03-CV-1684
Gwin, J.

GEORGE B. ALLEN SEP IRA, individually
and on behalf of all others similarly situated,
Plaintiff,

Case No. 5:03-CV-1852

vs.

FIRSTENERGY CORP., *et al.*,
Defendants.

OPINION & ORDER
[Resolving Doc. Nos. 8, 10]

NELLIE C. SHARPE, individually and on
behalf of all others similarly situated,
Plaintiff,

Case No. 5:03-CV-1992

vs.

FIRSTENERGY CORP., *et al.*,
Defendants.

OPINION & ORDER
[Resolving Doc. Nos. 13, 15, 19]

THE CITY OF STERLING HEIGHTS
GENERAL EMPLOYEES RETIREMENT
SYSTEM, *et al.*, on behalf of themselves
and all others similarly situated
Plaintiffs,

Case No. 5:03-CV-2085

vs.

FIRSTENERGY CORP., *et al.*,
Defendants.

OPINION & ORDER
[Resolving Doc. Nos. 4, 6, 15]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Pending before this Court are ten putative securities fraud class actions against Defendant

Case No. 5:03-CV-1684
Gwin, J.

FirstEnergy Corporation and certain of its officers and directors.^{1/} On October 10, 2003, Plaintiff The City of Sterling Heights General Employees Retirement System and the Central Laborer's Pension Fund (the "Institutional Investors Group") moved for consolidation of these cases, for appointment as lead plaintiff, and for approval of its choice of counsel pursuant to the Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 78u-4. The Institutional Investors Group also asks the Court to order the preservation of documents relating to this litigation.

In an order of November 21, 2003, the Court ordered any party wishing to object to the Institutional Investor Group's motion to consolidate or its motion for appointment as lead plaintiff and approval of its choice of lead counsel to do so by November 26, 2003. No party objected.

For the reasons set forth below, the Court consolidates the above-captioned cases, appoints the Institutional Investors Group as lead plaintiff, and approves its choice of lead counsel. Further, the Court orders the preservation of documents relating to this litigation as required by the PSLRA, 15 U.S.C. § 78e-4(b)(3).

I. BACKGROUND

Plaintiffs bring these securities fraud actions on behalf of a class of investors who purchased FirstEnergy securities between April 17, 2001 and August 19, 2003. FirstEnergy is an Akron-based company that owns utility businesses operating in Ohio, New Jersey, and Pennsylvania.

^{1/}The cases are *Godin v. FirstEnergy Corp., et al.* Case No. 03-CV-1684; *Mahon v. FirstEnergy Corp., et al.*, Case No. 03-CV-1711; *Campagnuolo v. FirstEnergy Corp., et al.*, Case No. 03-CV-1718; *Pollack v. FirstEnergy Corp., et al.*, Case No. 03-CV-1766; *Pylpow v. FirstEnergy Corp., et al.*, Case No. 03-CV-1768; *Malka v. FirstEnergy Corp., et al.*, Case No. 03-1799; *Mohror v. FirstEnergy Corp., et al.* Case No. 03-1848; *Allen v. FirstEnergy Corp., et al.*, Case No. 03-CV-1852; *Sharpe v. FirstEnergy Corp., et al.*, Case No. 03-CV-1992; and *The City of Sterling Heights General Employees Retirement System, et al. v. FirstEnergy Corp., et al.*, Case No. 03-CV-2085.

Case No. 5:03-CV-1684
Gwin, J.

Plaintiff Gerald Godin commenced the first securities fraud class action against FirstEnergy in this district on August 8, 2003. On August 11, 2003, Plaintiff Godin published notice of the pendency of the action over the *Business Wire*.^{2/} This notice advised class members of the existence of the securities class action lawsuit against FirstEnergy. The notice also alerted class members of their right to move for an appointment as lead plaintiff within 60 days. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i). Subsequently, nine other lawsuits were filed in this district alleging securities fraud by FirstEnergy and its directors.

All of the actions share essentially the same allegations. Plaintiffs allege that Defendants artificially inflated the price of FirstEnergy securities through a series of false and misleading statements about the Company's business and financial conditions during the putative class period. During this class period, Plaintiffs bought FirstEnergy securities. Plaintiffs also contend that FirstEnergy failed to disclose that the Company was not performing required maintenance and upgrades to its power generation and transmission assets. Furthermore, Plaintiffs aver that FirstEnergy engaged in improper accounting practices. Once these problems received public attention through FirstEnergy's downward restatement of its previously reported 2002 operating results and media attention on FirstEnergy after the August 14, 2003 blackout, the value of FirstEnergy's securities dropped. Since Plaintiffs purport to have bought FirstEnergy securities at artificially inflated prices, Plaintiffs allege that they sustained tremendous losses.

II. CONSOLIDATION

The Institutional Investors Group request that these ten securities fraud cases be consolidated as

^{2/}The PSLRA requires that a plaintiff advise putative class members of the pendency of a securities fraud class action through notice in a "widely circulated national business publication of wire service." 15 U.S.C. § 78u-4(a)(3)(A)(i). Publication of such notice in the *Business Wire* satisfies this requirement. *See, e.g., In re Century Bus. Servs. Sec. Litig.*, 202 F.R.D. 532, 537 fn. 9 (N.D. Oh. 2001).

Case No. 5:03-CV-1684
Gwin, J.

each sets forth similar, if not identical, factual allegations and claims. The Defendants agree that the cases should be consolidated.

Consolidation of related cases is appropriate where the cases involve common questions of law or fact. *See* Fed. R. Civ. P. 42(a); *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1010-11 (6th Cir. 1993). Such consolidation is common in federal securities class action cases. *See, e.g., Wright & Miller*, 9 Federal Practice & Procedure (1994) at § 2384; *see also In re Century Bus. Servs. Sec. Litig.*, 202 F.R.D. 532 (N.D. Ohio 2001); *In re Telxon Corp. Sec. Litig.*, 67 F. Supp. 2d 803 (N.D. Ohio 1999).

The ten above-captioned securities fraud actions share both factual and legal issues. More specifically, all of the actions allege a common course of conduct by the same defendants in violation of §§10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5, 17 C.F.R. § 240.10b-5. Consolidation will prevent unnecessary expense and delay in the resolution of these related actions. Consolidation is therefore appropriate under Fed. R. Civ. P. 42(a).

Accordingly, the Court consolidates the above-captioned cases, as well as all future related securities fraud actions, into the case number of the first-filed case. The case is re-captioned as *In re FirstEnergy Corporation Securities Litigation*, Case No. 5:03-CV-1684.

III. APPOINTMENT OF LEAD PLAINTIFF

After deciding a motion for consolidation, a Court shall "as soon as practicable . . . appoint the most adequate plaintiff as lead plaintiff for the consolidated actions." 15 U.S.C. 78u-4(a)(3)(B)(ii). The PSLRA establishes a rebuttable presumption that the most adequate plaintiff is the person or group of persons that:

(aa) has either filed the complaint or made a motion in response to a notice . . .

(bb) in the determination of the court, has the largest financial interest in the relief sought by

Case No. 5:03-CV-1684
Gwin, J.

the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

This presumption may be rebutted only upon proof that the presumed most adequate plaintiff (1) will not fairly and adequately protect the interests of the class; or (2) is subject to unique defenses that make the plaintiff incapable of representing the class. 15 U.S.C. § 78u-4(A)(3)(B)(iii)(II).

Currently, only the Institutional Investors Group has moved to be appointed lead plaintiff.^{3/} The Institutional Investors Group believes that it possesses the largest financial interest in the relief of any of the plaintiffs. Moreover, the Institutional Investors Group contends that it satisfies the requirements of Fed. R. Civ. P. 23. The Court agrees that the Institutional Investors Group meets the PSLRA's requirements for the presumed most adequate lead plaintiff.

The Court begins by comparing the financial stakes of the various plaintiffs and determining which has the largest interest in the lawsuit. The Institutional Investors Group alleges that it purchased almost 57,000 shares of FirstEnergy securities during the putative class period and suffered a loss of more than \$130,000. After comparing the alleged loss of the plaintiffs in the other nine putative class actions, the Court finds that this Institutional Investors Group has alleged the greatest loss of the named plaintiffs.^{4/} Therefore, Institutional Investors Group has the "largest financial interest" among the named plaintiffs in the

^{3/}A Gregory Desaye filed a motion to be lead plaintiff and to consolidate eight of the ten above-mentioned cases. However, he withdrew this motion on October 17, 2003.

^{4/}The certifications of the other plaintiffs state security purchases during the putative class period in amounts from 40 shares to 1000 shares. No plaintiff certifies having purchased more than 1000 shares, nor has any plaintiff alleged a total loss suffered as great as that of the Institutional Investors Group.

Case No. 5:03-CV-1684
Gwin, J.

class action. *See In re Milestone Scientific Sec. Litig.*, 183 F.R.D. 404, 413 (D.N.J. 1998); *In re Donnkenny, Inc. Sec. Litig.*, 171 F.R.D. 156, 158 (1997) (finding that plaintiff who alleged greatest loss during class period was presumptively the most adequate plaintiff).

Besides possessing the largest financial interest in the outcome of the litigation, the lead plaintiff must also satisfy the requirements of Fed. R. Civ. P. 23.^{5/} 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). Of particular concern in lead plaintiff determinations are the Rule 23 requirements that the lead plaintiff's claims be typical of the claims of the class and that the lead plaintiff fairly and adequately represent the class. *See Telxon*, 67 F. Supp. 2d 803, 807 fn. 10 (N.D. Ohio 1999). A party seeking appointment as lead plaintiff need make only a preliminary showing that it meets Rule 23's requirements. Of course, the Court's determination here does not prevent the parties later from contesting class certification. *See Holley v. Kittey Hawk, Inc.*, 200 F.R.D. 275, 277 (N.D. Tex. 2001).

"A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *In re Am. Med. Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996). The Institutional Investors Group's claims appear typical of the claims of the class. The Institutional Investors Group, like the class as a whole, contends that it purchased FirstEnergy securities at inflated prices during the class period. Furthermore, the Institutional Investors Group, like the class as a whole, premises its alleged damages on FirstEnergy's violations of the Securities Exchange Act and regulations.

The Court further finds that the Institutional Investors Group can fairly and adequately represent the

^{5/} Fed. R. Civ. P. 23 sets forth four prerequisites to a class action: (1) numerosity of class members; (2) common questions of law or fact among class members; (3) typicality of claims or defenses; and (4) fair and adequate representation of the class by the class representatives.

C. No. 84
G.

interests of the class. No conflict appears to exist between the Institutional Investors Group and the other members of the class. As a significant holder of FirstEnergy securities during the putative class period, the Institutional Investors Group will participate actively and control the litigation. Since no other plaintiff has been able to rebut the presumption that the Institutional Investors Group is the most adequate plaintiff under the PSLRA, the Court appoints Institutional Investors Group as lead plaintiff.

IV. APPROVAL OF LEAD COUNSEL

Although the PSLRA allows lead plaintiff to choose counsel, this right is not without limits. The district court may disapprove the lead plaintiff's choice in order to protect the interests of the plaintiff class. *See In re Centex Corp. Litig.*, 64 F.3d 1177, 1180 (9th Cir. 2000); *re Cav. Sug.*, 2006 WL 2619, at *9 (9th Cir. 2002). In considering the interests of the alleged class, courts should ask whether the lead plaintiff's choice "was the result of a good faith selection and negotiation process and whether it arrived at meaningful arms-length bargaining." *In re Cendant Corp. Litig.*, 264 F.3d 1177, 1180 (9th Cir. 2001). Courts may consider such factors as (1) the legal sophistication of the lead plaintiff; (2) the process by which the lead plaintiff chose counsel; (3) the qualifications and experience of the chosen counsel; and (4) any evidence that the retainer agreement between lead plaintiff and counsel was the result of meaningful negotiation. *Id.*

The Court approves the Institutional Investors Group's choice of lead counsel. Here, Institutional Investors Group selected William J. Lerach, Esq. and Darren J. Robbins, Esq. of Milberg Weiss Bershad Hynes & Lerach LLP as lead counsel and V. Eisman, Kennedy & Berris, C. L. A. as liaison counsel. Lead plaintiff shows the experience and skill of the proposed lead counsel and liaison counsel in managing this type of litigation through submission of firm resumes. If any party has objected to lead plaintiff's choice of counsel,

Case No. 5:03-CV-1684
Gwin, J.

V. PRESERVING DOCUMENTS

The Institutional Investors Group requests that this Court order the preservation of all documents related to the litigation. The Defendants oppose this order. The Defendants do acknowledge their statutory obligation under the PSLRA to preserve potentially relevant evidence. *See* 15 U.S.C. § 78u-4(b)(3)(C) (requiring all parties to securities class actions to preserve all relevant documents "as if they were the subject of a continuing request for production of documents from an opposing party").

Although the PSLRA automatically authorizes the relief requested by the Institutional Investors Group, the Court finds no harm in ordering the parties to abide by this requirement. Therefore, the parties shall preserve all documents relevant to the litigation as required by the PSLRA.

VI. ORDER

The motion to consolidate is GRANTED. The following actions are consolidated, and all subsequent documents shall be filed under the caption *In re FirstEnergy Securities Litigation*, Case No. 5:03-CV1684:

Godin v. FirstEnergy Corp., et al., 5:03-CV-1684
Mahon v. FirstEnergy Corp., et al., 5:03-CV-1711
Campagnuolo v. FirstEnergy Corp., et al., 5:03-CV-1718
Pollack v. FirstEnergy Corp., et al., 5:03-CV-1766
Pylpow v. FirstEnergy Corp., et al., 5:03-1768
Malka v. FirstEnergy Corp., et al., 5:03-CV-1799
Mohror v. FirstEnergy Corp., et al., 5:03-CV-1848
Allen v. FirstEnergy Corp., et al., 5:03-CV-1852
Sharpe v. FirstEnergy Corp., et al., 5:03-CV-1992
The City of Sterling Heights General Employees Retirement System, et al. v. FirstEnergy Corp., et al., 5:03-CV-2085

The Court appoints the Institutional Investors Group as lead plaintiff in the consolidated action. The Court also approves the Institutional Investors Group's choice of lead counsel. From the date of this

Case No. 5:03-CV-1684
Gwin, J.

Order, the lead plaintiff shall have 45 days to file an amended complaint. The Defendants will then have 30 days to answer or otherwise respond to this consolidated complaint. Furthermore, the Court orders the preservation of all documents relevant to the litigation as required by the PSLRA.

IT IS SO ORDERED.

Dated: December 9, 2003

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE